

No. 2016-1654

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

WYANDOT NATION OF KANSAS, a/k/a
WYANDOTTE TRIBE OF INDIANS,

Plaintiff-Appellant,

vs.

THE UNITED STATES,

Defendant-Respondent.

Appeal from the United States Court of Federal Claims
in Case No. 15-560C, Judge Thomas C. Wheeler

**CORRECTED
REPLY BRIEF OF PLAINTIFF-APPELLANT**

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LEGAL ARGUMENT

I. THE WYANDOT NATION IS A FEDERALLY-RECOGNIZED INDIAN TRIBE

A. The Wyandot Nation's members' ancestors were enrolled members of the federally-recognized Wyandotte Tribe of Indians in 1867.

The Government has asserted in its statement of facts that “[t]his case arises out of decisions made by the alleged ancestors of Plaintiff’s members to terminate their trust status in 1855 and become United States citizens....” Brief of the United States as Appellee (“Government’s Brief”), pg. 2. This is an erroneous statement. It is true that the historic Wyandott Nation was terminated under the under the Treaty of 1855 (“1855 Treaty”), 10 Stat. 1159 (Jan. 31, 1855). However, a subsequent treaty, the Treaty with the Seneca et al. of 1867 (“1867 Treaty”), 15 Stat. 513 (Feb. 23, 1867) created a new tribal governmental organization known as the “Wyandotte Tribe of Indians” which replaced the historic Wyandott Nation.¹

¹ The Government’s assertion that the 1867 Treaty tribe was the “Wyandotte Nation of Oklahoma” and that its headquarters were in Wyandotte, Oklahoma, is misleading and totally absurd. (Government’s brief, pg. 9). Federal legislation and Government communications referred the 1867 Treaty tribe as the “Wyandotte Tribe of Indians.” See *e.g.*, the Act of September 8, 1916 (39 Stat. 844) (“a tract of land in the city of Kansas City, Kansas, owned by the government of the United States, the use of which was conveyed by treaty to the **Wyandotte Tribe of Indians** as a cemetery for the members of the tribe . . .”; and the Act of June 30, 1919 (41 Stat. 3) (“a tract of land in the city of Kansas City, Kansas . . . was conveyed by treaty to the **Wyandotte tribe of Indians** as a cemetery”) (Compl. ¶¶ 56 and 58; Appx 041-043); the August 22, 1870 letter from BIA Clerk

The Wyandotte Tribe of Indians that was created in the 1867 Treaty is the federally recognized Indian tribe of which the Wyandot Nation is a continuation.

Article 13 of the 1867 Treaty provided for the creation of a Register, which “shall show the names of all who declare their desire to be and remain Indians, and in a tribal condition...and all such persons, and those only, *shall hereafter constitute the tribe.*” [emphasis added]. *Id.* The ancestors of all the current members of the Wyandot Nation of Kansas elected to become non-citizen Indians and were listed in the 1867 Treaty Register, and all of them became enrolled members of the newly created tribe called the “Wyandotte Tribe of Indians.” Their off-spring today, constitute the enrolled members of the Wyandot Nation. (Compl., ¶ 27; Appx 027).

Included in the 1867 Treaty Register (Appx 174-193 and 207-227) were the following Kansas Wyandots:

A. C. Franham to Commissioner of Indian Affairs Ely J. Parker (“all Wyandotte . . . should constitute the **Wyandotte tribe of Indians**); the January 8, 1871 letter from Superintendent Hoag to Commissioner Parker (“all Wyandotte . . . should constitute the **Wyandotte tribe of Indians**”); and the March 30, 1872 letter from Secretary Delano to Commissioner Francis A. Walker (“the list of sixty-five (65) Wyandotte citizens, certified to by the Agent, as being adopted to membership with the **Wyandotte tribe of Indians**”). (Comp. ¶¶ 30, 32 and 33; Appx 028-031). In 1867, when the 1867 Treaty was signed, the Wyandottes in Oklahoma were all citizen Indians, *i.e.*, non-tribal members, residing on land provided by the Seneca Nation. They had no headquarters in Wyandotte, Oklahoma.

- **Hannah Zane – a widow since 1843 never consented to become a citizen.** (Appx 193);
- **Eliza B. Conley – daughter of Hannah Zane**, who never made choice to become a citizen – Eliza wishes herself and family on the Indian list. (Appx 218).
- Sallie Conley – daughter of Eliza B. Conley. (Appx. 218).
- Lidie Conley – daughter of Eliza B. Conley. (Appx 218).
- Hannah Conley – daughter of Eliza B. Conley. (Appx 218).
- **Eliza Conley, Jr. – daughter of Eliza B. Conley. (Appx 218).**

Eliza Conley, Jr., is “Lyda Conley,” one of the Conley sisters that became the first Native American woman to become a member of the Kansas State Bar and the first Native American woman to argue a case before the U.S. Supreme Court. (Compl., ¶ 52; Appx 040). Thus, Lyda Conley, her mother and her sisters were unequivocally and conclusively enrolled members of the 1867 Treaty tribe, i.e., the federally recognized tribe called the “Wyandotte Tribe of Indians,” which changed its name to the “Wyandot Nation of Kansas” in 1959.

The Act of March 2, 1923, 42 Stat. 1785 (the “1923 Act”), which both the Government and the Court of Federal Claims (“CFC”) failed to consider, further documents the fact that the Conley sisters, Kansas Wyandots, were enrolled

members of the federally-recognized Wyandotte Tribe of Indians under the 1867 Treaty. Specifically, it provided:

That there be paid, out of any money in the Treasury no otherwise appropriated, the sum of \$267.32 to J. W. Glidden and E. F. Hobbs of Lawrence, Kansas, to reimburse them for money necessarily expended in connection with their contract with the government for the improvement of *Huron Cemetery, an Indian reservation in Kansas City, Kansas*, in defending their interests in suits brought by the *Connelley[sic] sisters, Indian wards of the Government*, to prevent them from carrying out their contracts with the United States Government in improving the Huron Cemetery in Kansas City, Kansas.

1923 Act (emphasis supplied).

The Conley sisters could not have been deemed “Indian wards of the Government” and the Huron Cemetery could not have been regarded as their Indian reservation in 1923, if they were not enrolled members of a federally-recognized Indian tribe.

B. The Wyandot Nation is the Present Day Continuation of the Wyandotte Tribe of Indians Recognized in the 1867 Treaty.

The Wyandotte Tribe of Indians existed as a federally-recognized tribe consisting of both Kansas and Oklahoma Wyandots from 1867 until 1937, when

the Oklahoma Wyandots splintered off and reorganized as a separate, new, federally-recognized tribe called the “Wyandotte Tribe of Oklahoma,” pursuant to the terms of the Oklahoma Indian Welfare Act (OIWA) (25 U.S.C. §503).

The Wyandotte Tribe of Oklahoma is not *itself* the 1867 Treaty Tribe, rather, it has an OIWA constitution and bylaws but its governmental powers are delegated to it by the Government in an OIWA corporate charter. Its rights under the 1867 Treaty are also delegated to it in its federal corporate charter, unlike the 1934 Indian Reservation Act, as amended, which preserved treaty rights in what is now 25 U.S.C. § 478b. Thus, Section 3(t) of the Wyandotte Tribe of Oklahoma’s OIWA corporate charter provides that “[t]he Wyandotte Tribe of Oklahoma shall have the... corporate powers ... [t]o protect all rights guaranteed to the Wyandotte Tribe of Oklahoma by treaty.” <https://www.loc.gov/law/help/american-indian-consts/PDF/38026361.pdf>.

However the creation of the new Wyandotte Tribe of Oklahoma as a OIWA federal corporation did not affect the continued existence of the federally recognized Wyandotte Tribe of Indians, which continues to the present day under the name of the Wyandot Nation of Kansas (“Wyandot Nation”). The United States argues that because the Oklahoma Band organized as a new tribe under the OIWA, the Kansas Wyandots were “effectively dis-enrolled” from the Wyandotte Tribe of Indians. (Government’s Brief, pg. 29). However, Defendant has provided no legal

or evidentiary support for the proposition that the OIWA had any such effect. The federal recognition of the Wyandot Nation a/k/a Wyandotte Tribe of Indians has never been terminated by an Act of Congress.

C. The fact that the Wyandot Nation’s members have incorporated one or more entities is irrelevant to the Nation’s status as a federally-recognized Indian tribe.

The fact that the Wyandot Nation of Kansas has incorporated one or more state chartered corporations to conduct its business is not dispositive of whether it is a federally-recognized Indian tribe. Many Indian tribes form both for-profit and nonprofit corporations under state law to conduct tribal business affairs. The Assistant Secretary of the Interior for Indian Affairs has encouraged this practice, publishing an online manual titled, “Choosing a Tribal Business Structure,” which states:

What is a tribal “business structure”?

Tribal “business structure” refers to the form a tribally (as opposed to an individual) owned business takes and under whose laws it will be organized. ***Tribal businesses can be formed*** through a federal charter under Section 17 of the Indian Reorganization Act (IRA), ***as a corporation chartered*** under tribally enacted laws, ***under a state’s incorporation laws, or as a limited liability company (LLC) organized under*** either a tribal code ***state law***. [emphasis added].

<http://www.bia.gov/cs/groups/xbia/documents/document/idc1032915.pdf>, last accessed on September 21, 2016.

Incorporating an entity cannot deprive the Wyandot Nation of its status as a federally-recognized Indian tribe: only an Act of Congress can accomplish that.

4791, §103(4) (A tribe that has been recognized by an Act of Congress “may not be terminated except by an Act of Congress.”)

D. The Wyandot Nation’s absence from the BIA’s List is not dispositive of the Nation’s status as a federally-recognized Indian tribe.

The Government convinced the CFC that the Wyandot Nation’s absence from the List Act terminated its existence as a federally recognized Indian tribe. (25 U.S.C.A. § 5131, formerly 25 U.S.C. §479a-1(a)). However, the Wyandot Nation’s absence from the list published by the Bureau of Indian Affairs (“BIA”) pursuant to the List Act, is not dispositive of the Nation’s status as a federally-recognized Indian tribe. The Bureau of Indian Affairs has been extremely lax in complying with its obligation to publish the list “annually before every January 30.” 25 U.S.C.A. § 5131(b). In the last decade, the agency was late several times, and didn’t even bother to publish a list for two of those years. See 81 FR 5019-02 (January 29, 2016, January 14, 2015); 78 FR 26384-02 (May 6, 2013); 77 FR 47868 (August 10, 2012); 75 FR 60810 (October 1, 2010); 74 FR 40218 (August 11, 2009); 73 FR 18553 (April 4, 2008), 72 FR 13648 (March 22, 2007). The List Act is nothing more than a guideline used by federal agencies to determine whether a tribe is qualified to receive federal services. It is not a tribal termination Act.

The List Act provides for a number of ways in which an Indian tribe may be recognized, including an Act of Congress or a decision of a United States court.

(108 Stat. 4791, §103(3)). The Government’s interpretation of the List Act would mean that an officer of the BIA could effectively void an Act of Congress or the decision of a United States court by stalling on the publication of the List or, as here, omitting the name of a tribe. This absurd result cannot have been the intent of the legislature.

II. THE WYANDOT NATION’S CLAIMS ARE TIMELY

A. The Government has not shown “beyond doubt” that all of the trust funds were appropriately disbursed prior to 1882.

The Government asserts that “Plaintiff’s claims that the Category One funds were mismanaged are barred by the six-year statute of limitations for claims filed in the CFC, 28 U.S.C. §2501, because those funds were paid out by no later than 1882,” (Government’s Brief, pg. 30), and that “[a]s a result of [the disposition of alleged trust funds made by 1882], the United States does not hold any funds in trust for plaintiff’s benefit and owes plaintiff no fiduciary duties.” (Government’s Brief p. 2). However, these are factual claims that are contrary to the allegations in the complaint and the reasonable inferences drawn therefrom, which must be construed in favor of the Wyandot Nation. *See Ritchie v. Simpson*, 170 F.3d 1092, 1097 (Fed. Cir. 1999); *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007). The United States failed to demonstrate that it was “beyond doubt that [the tribe] can prove no set of facts in support of [its] claim which would entitle [it] to relief.” *Davis ex rel. LaShonda D. v. Monroe County*

Bd. of Educ., 526 U.S. 629, 654 (1999) (internal quotation marks omitted), *on remand*, 206 F.3d 1377 (11th Cir. 2000). Indeed, many questions remain as to the disposition of the trust funds, which questions are the entire basis for the Wyandot Nation's request for an accounting.

Among other things, Schedule A of the 1867 Treaty provides as follows:

Schedule showing the several items embraced in the sum agreed to be paid to the Wyandottes by the 13th Article of the foregoing treaty.

1. Annuity due under the 6th Article of the treaty of January 31, 1855: \$8,750.00;
2. Amount discounted on \$53,594.53 in State bonds on the 13th of May, 1859: \$15,187.03;
3. Interest on the above \$15,787.03 (\$15,187.03) from May 13th, 1859, to February, 1867, at 5 percent: \$6,150.87;
4. Amount discounted on \$53,000 in State bonds, March 24, 1860: \$11,130.00;
5. Interest on the above \$11,130 from March 24, 1860, to February 24, 1867: \$4,618.95.

The above-named total sum is designed to represent the full claim of the Wyandottes against the United States under former treaties.

The 1st, 2d, and 4th items, together with another named in the 14th Article of the foregoing treaty, were examined and approved by the House Committee on Indian Affairs, and their payment recommended.

(See Congressional Globe, page 1037, part 2d, 2d session of 38th Congress.)

The 3d and 5th items constitute the interest on the monies discounted on the bonds mentioned in items 2 and 4. Although the committee did not recommend the payment of this interest, they acknowledged its justice, but said that its allowance would possibly endanger the passage of the appropriation, as the general feeling was averse to paying interest on claims.

1867 Treaty, 15 Stat. 513.

After 14 years, on March 3, 1881, Congress appropriated \$28,109.51 to pay the Wyandotte Tribe of Indians for claims based on Schedule A of the 1867 Treaty. Report of the Commissioner of Indian Affairs, 1881, p. XLII. The following year, in March and April of 1882, that \$28,109.51 was purportedly paid to the Wyandotte Tribe of Indians as full payment on their claims based on the 1867 Treaty. Report of the Commissioner of Indian Affairs, 1882, pp. 82-83.

The United States has neither shown what happened to the interest that accrued on the \$28,109.25 between 1868 and 1882, nor provided documentation that the funds were paid out in *per capita* payments to enrolled members of the Wyandotte Tribe of Indians, both in Kansas and Oklahoma, as mandated by Article 13 of the 1867 Treaty. There is evidence in the public record that some funds were

appropriated, but no evidence that the funds were properly **distributed**. The Wyandot Nation is entitled to claim its proportionate share of unclaimed per capita payments under 25 U.S.C. § 164, which may include a percentage of the entire \$28,109.25 if no per capita payments were ever made.

The purpose of the American Indian Trust Fund Management Act of 1994 (the “Reform Act”) was to provide federally-recognized tribes, such as the Wyandot Nation, a meaningful accounting for their treaty trust funds. A meaningful accounting cannot occur in pleadings filed in a federal civil action, like the Government is inviting this Court to do herein.

B. The statute of limitations does not begin to run until the Wyandot Nation has been furnished with an accounting.

Two recently decided cases lend additional support to the Wyandot Nation’s contention that the statute of limitations applicable to trust claims begins to run only after a tribe receives an accounting of trust funds from the United States.

In *Ramona Two Shields v. United States*, 820 F.3d 1324, 1329 (Fed. Cir. 2016), this court reiterated that “[a] cause of action for breach of trust traditionally accrues when the trustee ‘repudiates’ the trust and the beneficiary has knowledge of that repudiation.” *Id.*, citing *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed.Cir.2004). “A trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as a trustee.” *Id.*

Similarly, in *Goodeagle v. United States*, *Quapaw Tribe of Oklahoma v. United States*, and *Bear v. United States*, Nos. 12-431L, 12-592L, and 13-51X, 2016 WL 4733293 (Fed. Cl. Sept. 12, 2016), the court stated:

In breach of trust cases involving tribes, such as this one, the importance of a proper accounting cannot be overstated. Congress explicitly prohibits the statute of limitations from commencing to run until the tribe has been given an accounting. Without an accounting of trust management, a tribe is unable to determine whether any mismanagement has occurred.

* * * * *

A tribe's statutory right to an accounting is meant to provide it with a *historical* accounting in order to determine whether a loss has occurred. The Consolidated Appropriations Act allows a tribe to gather information about losses to trust funds such as the collection of payments, depositing of money, and assessment of penalties. (internal citations omitted).

III. THE WYANDOT NATION HAS ARTICLE III STANDING TO ASSERT ITS CATEGORY TWO CLAIMS AS IT HAS A FIFTH AMENDMENT PROTECTED PROPERTY INTEREST IN THE HURON CEMETERY

Pursuant to the 1843 Delaware Nation-Wyandot Nation Agreement (9 Stat. 337) that vested a property right in the Wyandot Nation in the Huron Cemetery under the Fifth Amendment, the 1855 Treaty (10 Stat. 1159) which reserved that vested property rights, and the 1867 Treaty that (15 Stat. 513) and the 1871 Act (16 Stat. 566; 25 U.S.C. § 71), both of which recognized the continued existence of that vested property right, the Wyandot Nation, as the Wyandotte Tribe of Indians, therefor has an existing Fifth Amendment protected property interest in the Huron Cemetery, and is entitled to an audit and accounting of the money that the BIA

should have collected for the use of two portions of the cemetery for Kansas City streets since 1857. When Indian land is recognized by a treaty or Act of Congress, it comes under the protections of the Fifth Amendment to the United States Constitution. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). The Government cannot thereafter take or confiscate the property unless the taking is for a public purpose, with due process of law and just compensation.²

Defendant has argued that “[w]hen the Wyandotte Nation of Oklahoma was reconstituted under the Treaty of 1867, it assumed beneficial interest in the Huron Cemetery,” and that “[i]n 1910, the Supreme Court confirmed that the Huron Cemetery was held in trust for the Wyandotte Nation of Oklahoma....” (Government’s Brief p. 12). However, as set forth above, there was no legal entity called the “Wyandotte Nation of Oklahoma” until 1937. The cemetery was held in trust for the Wyandotte Tribe of Indians.

² The CFC failed to discern the distinction between “recognized Indian title” and “aboriginal Indian title.” A taking of recognized Indian title, i.e., title recognized under a treaty or act of Congress, creates an obligation to pay just compensation to an Indian tribe under the Fifth Amendment. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). Extinguishment of aboriginal Indian title, on the other hand, does not create a legal obligation to pay compensation to an Indian tribe. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290-91 (1955). Both the Wyandot Nation and the Wyandotte Tribe of Oklahoma have an undivided Fifth Amendment property interest in all historical Wyandot treaty lands, including the Huron Cemetery.

When the historic Wyandott Nation acquired the 39 sections of land from the Delaware Nation in the inter-tribal Agreement of 1843, (9 Stat. 337), the historic Wyandott Nation acquired a Fifth Amendment-protected, vested property interest in the 39 sections, including the 2-acre Huron Cemetery. The land became trust property held in the name of the United States in trust for the historic Wyandott Nation.

The ownership and status of Huron Cemetery did not change under the 1855 Treaty, since it was exempted out of the ceded lands. It remained trust property, and beneficial title was still held by the members of the Wyandott Nation, who were all regarded as U.S. citizens.

The Wyandot Nation *is* a federally recognized tribe. However, even assuming, *arguendo*, that it were not, that fact would be irrelevant to Nation's claims to rights arising from the cemetery property, as even non-federally recognized tribes (which the Wyandot Nation is not) retain their treaty rights to property. *See Greene v. Babbitt*, 64 F.3d 1266, 1270 (9th Cir. 1995) (“[n]onrecognition of a tribe by the federal government... can have no impact on vested treaty rights...”); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203 (10th Cir. 2002) (“[T]he fact that a tribe is not administratively recognized does not affect that tribe's vested treaty rights”); *Menominee Tribe v. United States*, 391 U.S. 404

(1968)(Treaty hunting rights survived despite Congressional termination of all tribal political authority).

IV. THE WYANDOT NATION IS ENTITLED TO DISCOVERY

As argued above and in the Wyandot Nation's previously filed Brief, the Wyandot Nation's claims are timely and are not barred by any statute of limitations or of repose. Therefore, the CFC erred in granting the motion to dismiss without giving the Wyandot Nation the opportunity to conduct discovery.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Since 1937, when the Oklahoma Wyandottes separated from the Wyandotte Tribe of Indians and organized as a separate tribe under the OIWA, the Government has been unrelenting in its zeal to disenfranchise the enrolled members of the Wyandot Nation. The Government misled the CFC into believing that:

1. The enrolled members of the Wyandot Nation were terminated under the 1855 Treaty (Appx 001, 004) when they were in fact all subsequently included on the 1867 Treaty Register as enrolled members of a federally recognized Indian tribe called "Wyandotte Tribe of Oklahoma;"
2. The Oklahoma Wyandotte were loyal to the Union during the Civil War of 1861-1865 (Government's Brief, pg. 8) when it was actually

the Kansas Wyandots that were the loyal to the Union during the war;³

3. The Wyandot Nation has no property interest in the Huron Cemetery (Appx 009), when it is in fact a continuation of the 1867 Treaty tribe, and has an undivided, Fifth Amendment protected property interest in the cemetery;
4. The Wyandot Nation's absence from the List Act means that it is not a federally recognized Indian tribe (Appx 002 and 005), when the List Act specifically provides that a tribe that has been recognized by an Act of Congress "may not be terminated except by an Act of Congress," 108 Stat. 4791, §103(4), and the Government has failed to

³ The Oklahoma Wyandots actually came under the protection of the Confederate States of America in the Confederate Treaty of October 1861, which provided in pertinent part as follows:

ARTICLE 28. It is hereby declared and agreed that the institution of slavery in the . . . *Seneca and Shawnee tribes is legal . . .*; that *slaves are personal property . . .*

ARTICLE 32. In as much as the Seneca tribe and Senecas and Shawnees have received among them persons of the Wyandot tribe to the number of 113, and have given them land to live on without charge, and *in consideration of the loyalty of the Seneca tribe . . . and of the Wyandots who reside among them, . . .* the Confederate States do hereby further agree that they will expend in each and every year hereafter, for the term of twenty years . . . the sum of \$2,400 for the benefit of the Seneca tribe, *including . . . the Wyandots residing among each . . .* [emphasis added].

(Appx313, 318 and 321).

cite one act of Congress that terminated the Wyandot Nation's federal recognition under the 1867 Treaty; and

5. The Wyandot Nation terminated itself by being a party to a court settlement agreement that referenced it as a non-federally recognized tribe (Appx 005 and 008), when only an Act of Congress and not any type of agreement can terminate an Indian tribe's federal recognition.

For the reasons set forth in the Wyandot Nation's Opening Brief, and in this Reply Brief, the CFC's order dismissing the Wyandot Nation's Complaint should be reversed, and the case should be remanded to the CFC for further proceedings therein.

Dated: September 28, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **September 29, 2016**, a copy of the foregoing **CORRECTED REPLY BRIEF OF PLAINTIFF-APPELLANT** was sent to the following attorneys by email; and that a copy of the foregoing brief was filed with the Court using the Court's CM/ECF system, which will send notification of that filing to the following attorneys who have registered for electronic service:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 4,890 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ Brian J. Leinbach

Brian J. Leinbach